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MARIA FARIDAH ATIENZA v. HADIJAH MOHAMAED MOKHTAR & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID SALLEH JC
[CIVIL SUIT NO: WA-23CY-11-12-2016]
B 17 JANUARY 2018

CIVIL PROCEDURE: *Contempt of court – Committal proceedings – Breach of injunction order restraining contemnor from making statements against applicant pending disposal of defamation suit – Contemnor breached injunction and* C *continued to publish further statements – Whether contempt committed – Whether warranted committal order – Appropriate sentence – Rules of Court 2012, O. 52 r. 4*

The plaintiff successfully obtained an injunction restraining the first defendant from making any statement either to the journalist, any social D media, local newspapers, blogs or website against the plaintiff until the disposal of a defamation suit by the former against the latter. The first defendant breached the injunction and defied the same by continuing to publish further statements on her Instagram account. In the present application, the plaintiff sought for an order of committal against the first E defendant pursuant to O. 52 r. 4 of the Rules of Court 2012 ('the ROC'). The matter was fixed for hearing and the first defendant was supposed to have filed an affidavit in reply the day before the hearing but failed to do so. The matter was adjourned with the specific instruction for the first defendant to file an affidavit in reply. On the day of the hearing, counsel for the first F defendant informed the court that the first defendant could not be contacted and the draft affidavit in reply remained unsigned.

Held (granting order in terms of application):

(1) The plaintiff had complied with O. 52 of the ROC. The first defendant G was aware of the existence of the injunction and the court case against her. However, she chose to disobey the order. She was given the opportunity to explain her actions yet she chose to simply ignore it with impunity. The first defendant was in contempt of the injunction order. Her action in continuing with the posting of further comments on her Instagram account was not only contumacious but was also done on H purpose. (paras 17, 19 & 20)

(2) The first defendant was fined RM30,000 which must be paid by 12pm the next day (of the hearing), in default of which, two weeks' imprisonment. Since the first defendant failed to pay the same within the I stipulated period, a warrant of arrest was issued against her and she would not be able to defend her case until she purges the contempt. (paras 5 & 23)

Case(s) referred to:
Dato' Seri S Samy Vellu v. Veerasamy Perumal & Anor [1995] 1 CLJ 353 HC ***(refd)***
Datuk Hong Kim Sui v. Tiu Shi Kian & Anor [1987] 1 CLJ 438; [1987] CLJ (Rep) 1 PC ***(refd)***
Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(refd)***
Dr Leela Ratos & Ors v. Anthony Ratos Domingos Ratos & Ors [No. 3] [1997] 1 CLJ Supp 115 HC ***(refd)***
Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 CA ***(refd)***
Kent County Council v. Batchelor (1976) 75 LGR 151 ***(refd)***
MBf Holdings Bhd & Anor v. Houng Hai Kong & Ors [1993] 3 CLJ 373 HC ***(refd)***
Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA ***(refd)***
TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 LNS 126 FC ***(refd)***
William Jacks & Co (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor [1994] 3 CLJ 125 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 52 rr. 4, 7(1)

For the plaintiff - Harjinder Singh & Muhammad Rafiqree; M/s Harjinder & Assocs
For the defendant - Nur Khairunnisa Mohd Rosni; M/s Farid Aziz & P Vignesh

Reported by Najib Tamby

JUDGMENT

Wan Ahmad Farid Salleh JC:

[1] This is a defamation case. On 2 June 2017, after having heard the application made by the plaintiff in encl. 6 herein, my learned brother Mohd Zaki Abdul Wahab J had made an injunctive order against the first defendant. The injunction order ("the injunction"), made *inter partes*, goes, *inter alia,* as follows:

> Bahawa satu Perintah Injuksi menahan Defendan Pertama sama ada sendiri dan/atau melalui agennya dan/atau pekerjanya dan/atau pihak-pihak berkaitan dengannya, daripada membuat kenyataan dan/atau penerbitan melalui apa-apa bentuk media termasuklah dan tidak terhad kepada kenyataan kepada wartawan, kenyataan di mana-mana laman sosial, akhbar-akhbar tempatan, blog ataupun laman-laman web terhadap Plaintif sehingga pendengaran tindakan ini adalah dibenarkan.

[2] The first defendant was in breach of the injunctive order. Unhappy with the situation, the plaintiff, through an *ex parte* application in encl. 26, had sought leave for an order of committal against the first defendant. I had granted the leave on 26 September 2017.

[3] The instant application against the first defendant, which is in encl. 31, was made by the plaintiff under O. 52 r. 4 of the Rules of Court 2012 ("ROC"). The matter was fixed for hearing on 13 October 2017 and that the

first defendant was supposed to have filed in an affidavit in reply ("AIR") on the day before. On 13 October 2017, the then counsel for the first defendant informed the court that she could not file in the AIR on behalf of her client since the client had "only recently got married". I then adjourned the matter to 6 November 2017 with the specific instruction for the first defendant to file in the AIR by 13 October 2017.

[4] On 6 November 2017 the then counsel for the first defendant informed the court that she could not contact her client and the draft affidavit in reply remained unsigned. Learned counsel for the plaintiff insisted on proceeding with the hearing of the application in encl. 31. When I asked the then counsel for the first defendant on the failure of the first defendant to abide by the direction of the court to file in the AIR, she then left the matter to the court.

[5] In view of the blatant defiance of the first defendant to abide by the order of the court, I had granted an order in terms of the application in encl. 31 and imposed a fine on the first defendant for a sum of RM30,000 which must be paid by the first defendant as the contemnor by 12pm the next day, in default of which, I had imposed a two-week's imprisonment.

[6] Here are my reasons.

The Application

[7] The injunction practically restrained the first defendant from making any statement either to the journalist, any social media, local newspaper, any blogs or website against the plaintiff until the disposal of the suit. The first defendant must have been fully aware of the existence of the injunction since she was represented by her counsel at the hearing of the *inter partes* application.

[8] The sealed copy of the order dated 2 June 2017 was duly served on the then solicitors acting for the first defendant.

[9] I think the law is quite trite on this. The knowledge of a solicitor is imputed upon his client as stated clearly in *Doshi v. Yeoh Tiong Lay* [1974] 1 LNS 30; [1975] 1 MLJ 85 FC. The Court of Appeal in *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167; [2005] 2 MLJ 589 CA in reiterating the proposition of law as stated in *Doshi*, held as follows:

> And the general rule is that the knowledge of a solicitor is the knowledge of his client thereby depriving a client of the plea of lack or absence of knowledge due to the failure of his solicitor to disclose the true facts to him.

[10] In her affidavit in support of the application dated 27 September 2017 ("AIS") which is in encl. 32, the plaintiff had affirmed that despite the clear words of the injunction, the first defendant had blatantly defied the same by

continuing publishing further statements in her Instagram account (@karenazman69). An example of the instagram posting can be seen in exh. MFA-6 of the AIS which is reproduced here:

> 2week.. nx month sy bakal berentap di court dgn tutttttttt!!! Pompuan tuuu!! Prepare la kata kau hebat sgt kan ...
>
> Biar dia bsedia utk diheret ke court .. dia ingt main ckp fitnah buruk kn org tut k slh ... smpi je court makk herett nakkkk ... org bkahwin nk hidup aman damai ... kau dpt apa kuda?? dpt saman mulut jahat sgt.

There were three other instances as exhibited in exhs. MFA-3, MFA-4 and MFA-5 where the first defendant had allegedly defied in the injunction order.

[11] As indicated earlier, the first defendant did not file any affidavit in reply, despite being given the opportunity by the court to do so. I can only conclude that failure to respond to the plaintiff's allegations in the AIS would mean that the first defendant had admitted that the allegations were true. If any authority is needed for the aforesaid proposition of law, it can be seen in the Court of Appeal case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA where Gopal Sri Ram JCA (later FCJ) in delivering the decision of the court said:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] CLJ (Rep) 45; *Overseas Investment Pte. Ltd. v. O'Brien* [1988] 2 CLJ 238; [1988] 3 MLJ 332.

[12] There was no application on the part of the then counsel for the first defendant to cross-examine the plaintiff either.

The Law

[13] I think the law in respect of the implication of disobeying an injunctive order of the court is very clear. In fact, Lord Denning MR was of the opinion that such a disobedience would be equivalent to a criminal charge. In *Kent County Council v. Batchelor* (1976) 75 LGR 151 CA, Lord Denning MR said as follows:

> A contempt of court by disobedience of an injunction was equivalent to a criminal charge. For disobedience of an injunction a man could be sent to prison for an indefinite time. On such a charge and with such consequences the burden was upon those making the charge to prove it beyond reasonable doubt.

[14] In *MBf Holdings Bhd & Anor v. Houng Hai Kong & Ors* [1993] 3 CLJ 373; [1993] 2 MLJ 516, the plaintiff obtained an *ex parte* interlocutory injunction ("the order") restraining the defendants from doing certain acts, including printing, circulating, distributing or publishing any allegation of impropriety, irregularity and illegality against the plaintiffs or their

A subsidiaries and affiliated companies on 9 February 1993. On 23 February 1993, the plaintiffs obtained *ex parte* leave from the High Court to issue a motion for contempt against the defendants for their alleged disobedience of the order. The plaintiffs' substantive motion to commit the defendants for contempt was filed on 25 February 1993.

B **[15]** Anuar J (later CJ (Malaya)) in delivering his judgment had first referred to the case of *Datuk Hong Kim Sui v. Tiu Shi Kian & Anor* [1987] 1 CLJ 438; [1987] CLJ (Rep) 1; [1987] 1 MLJ 345 PC for the proposition of law that while the order of the court stood unvaried, the defendants are bound to comply with its terms. Any breach of the order would subject the C defendant to a potential contempt proceeding. It is quite clear that this court has the power and jurisdiction to deal with contempt. The learned judge further held as follows:

> It has been argued by the defendants that *Arthur Lee*'s case 9 [*Arthur Lee Meng Kuang v. Faber Merlin Malaysia Bhd & Ors* [1986] 1 MLJ 193 SC] is D not binding on me because the Supreme Court was not addressed on the difference between powers and jurisdiction. Whilst the discussion may not have taken place, it is plain that even without the aid of the decision in *Arthur Lee 9*, the High Courts and Supreme Court of this country have ample jurisdiction, authority and power to punish for contempt of themselves. To hold otherwise would be an absurdity and would leave E the courts vulnerable. Public policy demands that this should not happen.

[16] In *TO Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126; [1977] 1 MLJ 151 SC, the learned judge of the High Court, found that the appellant, an advocate, was guilty of contempt of court by aiding and abetting his clients to commit breaches of a court order. The court order in that case F was an injunction which had been granted by the High Court to restrain the clients of the appellant and their servants or agents from (a) disposing of or removing any property or assets of the firm of East Malaysia Sea Products Company until the trial of the action or further order (b) interfering with the respondent's use and enjoyment of the firm's factory premises. It was alleged G that the appellant was liable for contempt:

(a) in aiding and abetting his, clients to take active steps in interfering with the respondent's use and enjoyment of the factory premises notwithstanding the court order; and

H (b) in preventing the respondent from inspecting the factory premises.

On appeal, the then Supreme Court, in affirming the decision of the learned judge at first instance held as follows:

> A person against whom an injunction has been awarded and who disregards it, is liable to be dealt with for contempt whatever the nature I of the injunction may be and whether it is mandatory or restraining in its form, and whether it be made *ex parte* upon hearing both sides or be

interim or perpetual. With respect, the learned judge was right to find appellant guilty of contempt in aiding and abetting Chai and his wife to disobey "the court order". A

The Analysis

[17] Having outlined the legal proposition, the next thing to do is to apply the law to the facts of the case. It is abundantly clear that the first defendant was aware of the existence of the injunction against her. Yet she chose to disobey the order. She was given the opportunity to explain her action. Yet she chose to simply ignore it with impunity. The intention is all too clear. B

[18] In any case, the Court of Appeal in *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 CLJ 549 CA had made clear in no uncertain terms that *mens rea* is not an ingredient to be proved in contempt proceedings. This judgment of the Court of Appeal was affirmed by the Federal Court; see *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd & Anor* [2002] 4 CLJ 401 FC. C

[19] In the result, I found that the first defendant was in contempt of the injunction order. Her action in continuing with the posting of further comments in her Instagram account was not only contumacious, but it was also done on purpose. The contemnor was fully aware of the court case against her. She said she was prepared to face the plaintiff in court, yet she opted not to use the due process available to her. D E

[20] I also found that the plaintiff had complied with O. 52 of the ROC.

The Sentence

[21] There are a few cases that can be of guidance to this court in imposing the sentence on the contemnor. In *Dr Leela Ratos & Ors v. Anthony Ratos Domingos Ratos & Ors [No. 3]* [1997] 1 CLJ Supp 115; [1997] 1 BLJ 115; [1997] 1 MLJ 704, the third contemnor was guilty of contempt *ex facie curiae* for failing to give the court a satisfactory explanation as to his client's absence at the court's hearing. The third contemnor was sentenced to one day's imprisonment and a fine of RM50,000 in default of six months. In *Dato' Seri S Samy Vellu v. Veerasamy Perumal & Anor* [1995] 1 CLJ 353, the applicant applied for an order of committal against the first respondent on the ground that the first respondent was in contempt of court for breaching an injunction order which *inter alia*; restrained the respondents from further publishing defamatory allegations concerning the applicant's alleged involvement in the purported allotment of ten million Syarikat Telekom shares to Maika Holdings Bhd. The court held that the respondent had been determined to continue publishing attacks on the applicant in spite and in disregard of the court order. In the witness box, he did not appear at all repentant. The court, therefore, ordered that the respondent be committed to prison until such time as the court, on his application under O. 52 r. 7(1) should see fit to discharge him. F G H I

[22] In *William Jacks & Co (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor* [1994] 3 CLJ 125; [1994] 3 MLJ 40, the plaintiff obtained an injunction to restrain the defendant from delivering the orders of equipment to Ancom Bhd ("Ancom"). The injunction was served on the defendants on 30 May 1990. However, the defendants caused the equipment to be delivered to Ancom on 20 July 1990 by requesting the manufacturers of the equipment, Lightnin Pty Ltd, Singapore, to deliver the equipment directly to Ancom. The three directors of the defendant were committed to imprisonment until they purged their contempt because the defendants had not only disobeyed the injunction but also attempted to circumvent it. This was later reduced to a fine of RM2,000 each in default one month's imprisonment, after the directors had served a few days of imprisonment. Another director was fined RM5,000 in default two months' imprisonment as he was given the benefit of the doubt that he might have been ignorant of the order.

[23] Having regard to the circumstances of the case and the authorities aforesaid, the imposition of the fine on the contemnor as aforesaid with the default clause in my considered opinion is reasonable. Since the contemnor had failed to pay the same within the stipulated period, I further order that a warrant of arrest be issued against her and that she would not be able to defend her case until she purges the contempt.